**UNITED STATES OF AMERICA**
**MERIT SYSTEMS PROTECTION BOARD**

**2009 MSPB 92**

Docket No. DA-0752-09-0059-I-1

**David C. Potter,**

**Appellant,**

**v.**

**Department of Veterans Affairs,**

**Agency.**

June 4, 2009

David C. Potter, Bonham, Texas, pro se.

Kenneth S. Carroll, Esquire, Dallas, Texas, for the agency.

**BEFORE**

Neil A. G. McPhie, Chairman
Mary M. Rose, Vice Chairman

## OPINION AND ORDER

¶1 This case is before the Board on the appellant's petition for review of an initial decision that dismissed his appeal as settled. For the reasons discussed below, we find that the petition does not meet the criteria for review set forth at 5 C.F.R. § 1201.115, and we therefore DENY it. However, we REOPEN this case on our own motion under 5 C.F.R. § 1201.118, SET ASIDE the settlement agreement, VACATE the initial decision, and REMAND the appeal to the Dallas Regional Office for further consideration consistent with this Opinion and Order.

BACKGROUND

¶2 On June 27, 2008, the agency sent the appellant, a Cook/Driver, a letter notifying him that he must provide a valid commercial driver's license (CDL), which was a condition of his employment, to his supervisor or "action may be taken to remove" him. Initial Appeal File (IAF), Tab 8, Subtab 4c. The agency sent the letter after it learned that the appellant's CDL had been confiscated by police based on suspicion of drunk driving. *Id.*, Subtab 4d. On June 30, 2008, the appellant sent an email to his supervisor stating the following: "I cannot produce what [the agency] is asking for and, [the agency] knew that before the letter was written. Could you please terminate my employment with the [agency] today so that I do not have to go through a long and drawn out process." *Id.*, Subtab 4b. The agency interpreted the June 30, 2008 email as a resignation, effective July 1, 2008. *Id.*, Subtab 4a.

¶3 The appellant filed an appeal with the Board asserting that his resignation was involuntary. IAF, Tab 1 at 2. He asserted that he did not intend for his email to constitute a resignation; rather, he asserted that he was attempting to convey to the agency that if he was going to be removed, he preferred for the agency to do it immediately instead of subjecting him to "more harrassment" (sic). *Id.* at 7. The administrative judge conducted a hearing in which the appellant, who was pro se, presented his case. *See* Hearing Compact Disc (HCD). Following the appellant's presentation and with his permission, the administrative judge and the agency representative privately discussed the potential for settlement. *See id.* After then consulting with the appellant, the agency representative advised the administrative judge that the parties had reached a settlement and requested the administrative judge to enter the settlement agreement into the record for enforcement purposes. *See id.* In the settlement agreement, the agency agreed to hire the appellant as a Cook/Driver and pay him $4,000. *See* IAF, Tab 19 at 1. The administrative judge advised the parties that, based on the testimony of the appellant and his witnesses, she would accept the settlement agreement into the

record. *See* HCD. She then issued an initial decision entering the settlement agreement into the record and dismissing the appeal without making a jurisdictional finding. IAF, Tab 20, Initial Decision at 1-2.

¶4 The appellant has filed a petition for review, Petition for Review File (PFRF), Tabs 1-2, and the agency has filed a response in opposition, presenting evidence that the appellant has been reinstated per the terms of the settlement agreement but that he refuses to accept the $4,000, *id.*, Tab 5 at 1-4, 7-8.[1]

## ANALYSIS

The appellant has not established that the settlement agreement was involuntary.

¶5 The appellant's petition for review challenges the validity of the settlement agreement on the basis of duress, coercion, and emotional distress. *See* PFRF, Tab 1 at 2-4. The party challenging the validity of a settlement agreement bears a heavy burden of showing a basis for invalidating it. *Bynum v. Department of Veterans Affairs*, 77 M.S.P.R. 662, 665 (1998). Here, the appellant appears to assert that he was under duress when he agreed to the settlement and that he felt pressured by the agency representative to quickly accept it. PFRF, Tab 1 at 2. The appellant also asserts that he agreed to the settlement because he "felt obligated" after telling the administrative judge prior to the hearing that he refused the agency's previous offer to rehire him because he would need at least $4,000 to relocate. *Id.* He further asserts that he could not concentrate and was very confused and overwhelmed as to what was happening during the hearing and settlement discussions and that he "[j]ust wanted things to end, especially the anxiety." *Id.* at 8. He claims that based on the medical evidence in the record,

[1] We have not considered the appellant's Response to Agency Response, filed on March 31, 2009, as the record closed on review on March 20, 2009, and the appellant has failed to assert or demonstrate that his Response contains evidence that was not readily available before the record closed. *See* 5 C.F.R. § 1201.114(i); PFRF, Tabs 3, 7.

the administrative judge should have protected him from being misled by the agency. *Id.* at 3.

¶6 To establish that a settlement was fraudulent as a result of coercion or duress, a party must prove that he involuntarily accepted the other party's terms, that circumstances permitted no alternative, and that such circumstances were the result of the other party's coercive acts. *Candelaria v. U.S. Postal Service*, 31 M.S.P.R. 412, 413 (1986). An appellant's mere post-settlement remorse or change of heart cannot serve as a basis for setting aside a valid settlement agreement. *Thompson v. Department of Veterans Affairs*, 52 M.S.P.R. 233, 237 (1992). Where an appellant alleges emotional distress as grounds for voiding a settlement agreement, the Board will consider: whether the appellant was represented below; whether he has demonstrated that he was mentally impaired at the time of settlement; and whether he has otherwise shown that he was unable to fully understand the nature of the settlement agreement or to assist his representative in the appeal. *Short v. U.S. Postal Service*, 66 M.S.P.R. 214, 219 (1995). A party to a settlement agreement is presumed to have full legal capacity to contract unless he is mentally disabled and that mental disability is so severe that he cannot form the necessary intent. *Brown v. Department of the Interior*, 86 M.S.P.R. 546, ¶ 13 (2000).

¶7 In this case, the appellant was not represented when he entered into the settlement agreement. However, the medical evidence submitted by the appellant fails to establish that his emotional stress or depression was so severe that he was unable to fully understand the nature of the settlement agreement. *See* IAF, Tab 13 at 2, Tab 16 at 6-31, Tab 18 at 3-16. Specifically, the appellant submitted various medical records dating from June 2006, May 2008, and July 2008. *See id.* Many of these documents are urinalysis results and other lab reports that do not speak to the appellant's mental health. *See, e.g.*, *id.*, Tab 16 at 8-9, 15-19, 22-26. A summary report from a licensed clinical social worker, who counseled the appellant from July 1 to July 30, 2008, indicates that the appellant suffered

from depression and complained of experiencing difficulties with his memory and concentration. *See id.*, Tab 16 at 4, 6-7. Additionally, a July 2, 2008 notation from a social worker who met with the appellant at an urgent care clinic indicates that the appellant screened positive for severe depression and was escorted to the emergency room for a mental health evaluation. *See id.*, Tab 18 at 13-16. The appellant failed, however, to submit the results of any such evaluation and failed to present medical evidence more recent than July 2008, three months before he filed his Board appeal and six months before he entered the settlement agreement. Therefore, the documentation submitted by the appellant does not suggest that his emotional difficulties were so severe that he could not form contractual intent at the time he entered into the settlement agreement. Moreover, the hearing compact disc reveals that when questioned by the administrative judge regarding the settlement agreement, the appellant not only affirmed that he was voluntarily entering into the agreement but also noted without prompting that he was "very pleased" with the terms, suggesting that the appellant appreciated the nature and intent of the agreement. *See* HCD.

¶8 Furthermore, the appellant has failed to present evidence that the agency representative engaged in any coercive acts or that the circumstances were such that there was no alternative to accepting the agreement as presented by the agency. While the appellant asserts that he was coerced into signing the agreement as a result of time pressure, the appellant's petition for review explains that the parties were engaged in negotiations regarding the specific provisions of the agreement before the date of the hearing. *See* PFRF, Tab 1 at 2. Based on the appellant's assertions, the only term of the settlement agreement that was altered from the prior negotiations was the addition of a $4,000 payment to the appellant. *See id.* The appellant asserts that the agency representative spoke briefly with the administrative judge following the appellant's presentation of his case and then questioned whether the appellant would agree to "settle right now" if the agency "could get [him]" $4,000, and the appellant said yes. *See id.* While the appellant

notes in his petition for review that he was feeling "very nervous" and "obligated" because he had previously told the administrative judge that he would need $4,000 to relocate, he does not assert that he indicated to the agency representative that he needed more time to consider the settlement offer. *See id.* He also does not assert that the administrative judge or the agency representative actually suggested that he was somehow obligated to accept the terms of the settlement agreement based on his previous suggestion of a $4,000 payment. *See id.* Accordingly, the appellant has failed to establish that the settlement agreement was involuntary as a result of duress, coercion, or emotional distress. The petition for review is therefore DENIED.

The settlement agreement must be set aside because of a mutual mistake of law.

¶9 Although we decline to find the settlement agreement invalid on the basis of coercion or duress, we REOPEN this appeal and find the agreement invalid on the basis of a mutual mistake of law. A settlement agreement must be set aside if it is tainted with invalidity by a mutual mistake of law under which both parties acted. *E.g.*, *Stipp v. Department of the Army*, 61 M.S.P.R. 415, 418-19 (1994) (setting aside settlement agreement due to mutual mistake as to lawfulness of material provision). In this case, the parties settled under the erroneous impression that the settlement agreement would be entered into the record for enforcement by the Board, a mutual mistake of law that goes to the heart of the agreement.[2] *See Adkins v. U.S. Postal Service*, 86 M.S.P.R. 671, ¶ 9 (2000). An

[2] In two submissions filed on April 30, 2009, over one month after the record closed on review, the appellant asserts that his attorney informed him on April 20, 2009, that his Texas driver's license is invalid and therefore the settlement agreement should be set aside because possession of a valid license is an explicit term of the agreement. *See* PFRF, Tab 3 at 1, Tab 8 at 4, Tab 9 at 1-2, 5. Assuming, for the sake of argument, that this evidence was not readily available before the record closed on review, it is immaterial to the outcome of this case. *See* 5 C.F.R. § 1201.114(i). The possession of a valid Texas license is not a term of the settlement agreement, *see* IAF, Tab 19 at 1-2, and, as fully discussed below, the settlement agreement must be set aside on other grounds.

administrative judge may not accept a settlement agreement into the record for enforcement purposes unless she has first made a determination that the Board has jurisdiction over the underlying action. *See Cimilluca v. Department of Defense*, 77 M.S.P.R. 256, 258 (1998). Because the administrative judge here never made that determination, in that she failed to make the required finding that the Board has jurisdiction over the appellant's alleged involuntary resignation, the settlement agreement could not properly be entered into the record for enforcement purposes. *See Adkins*, 86 M.S.P.R. 671, ¶ 10. Nevertheless, entering the settlement agreement into the record for enforcement purposes was an express term of the settlement agreement. *See* IAF, Tab 19 at 2. Allowing the parties to include this term in the settlement agreement was clear error, requiring the Board to SET ASIDE the settlement agreement and VACATE the initial decision. *See Adkins*, 86 M.S.P.R. 671, ¶ 10; *Stipp*, 61 M.S.P.R. at 418, 420.

## ORDER

¶10 We REMAND this appeal to the Dallas Regional Office for further consideration consistent with this Opinion and Order, including a new jurisdictional hearing if necessary. The administrative judge must issue a new initial decision with appropriate factual findings and credibility determinations on the jurisdictional issue. If the administrative judge determines that the Board

lacks jurisdiction, she shall dismiss the appeal. If she determines that the appellant has established board jurisdiction over the matter at issue, she shall adjudicate the appeal on the merits.

FOR THE BOARD:

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William D. Spencer
Clerk of the Board
Washington, D.C.